BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN OREM	)	
Claimant	)	
V.	)	
	)	
COMMUNITY LIVING OPPORTUNITIES	)	
Respondent	)	Docket No. 1,047,460
AND	)	
	)	
KANSAS EMPLOYERS WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

The parties appealed the November 19, 2014, Award Upon Review and Modification entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on April 7, 2015.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Darin M. Conklin of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board is listed in the Award Upon Review and Modification. At oral argument, the parties stipulated that any modification of claimant's workers compensation benefits should commence on March 12, 2014, the date respondent filed its Application for Review and Modification.

ISSUES

The ALJ entered an Award on March 8, 2012. On appeal, the Board modified the Award by its August 14, 2012, Order. In both the Award and Order, claimant was found to be permanently and totally disabled. On March 12, 2014, respondent filed an

Application for Review and Modification, seeking a modification of the award because "Claimant is to receive social secruity *[sic]* retirement benefits effective February 28, 2014, and thus the initial weekly payment rate as set forth in the Order is excessive."[1] ALJ Avery found respondent was entitled to a credit for Social Security retirement benefits under K.S.A. 2008 Supp. 44-501(h) in the amount of $135.50 per week.

Claimant contends that based upon *Hoesli*,[2] respondent is not entitled to an offset pursuant to K.S.A. 2008 Supp. 44-501(h). Claimant asserts retirement benefits are no longer duplicative of wages and, therefore, should not be offset against claimant's entitlement to permanent total disability benefits.

Respondent maintains the plain language of K.S.A. 2008 Supp. 44-501(h) and binding precedent dictate respondent is entitled to the offset. Respondent asserts the ALJ improperly calculated the offset and the proper amount of the credit is $245.28 per week.

The issues before the Board on this appeal are:

1. Under K.S.A. 2008 Supp. 44-501(h), should claimant's workers compensation benefits be reduced by the weekly equivalent of his Social Security retirement benefits?

2. If so, how is the weekly equivalent of claimant's Social Security retirement benefits calculated?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

When respondent filed its Application for Review and Modification, claimant was 67 years of age. He has not been employed since March 24, 2009, the date of accident in this claim. Claimant is currently receiving permanent total disability benefits from respondent at the rate of $298.26 per week.

At the time of his accident, claimant had not applied for Social Security disability or retirement benefits. According to claimant, he applied for Social Security disability benefits in late March or early April 2009. He did so based upon a discussion with respondent, in

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[1] Application for Review and Modification (filed March 12, 2014).

[2] *Hoesli v. Triplett, Inc.*, 49 Kan. App. 2d 1011, 321 P.3d 18 (2014), *pet. for rev. filed* Apr. 3, 2014.

which "They told me I couldn't work anymore."[3] Claimant testified at the November 10, 2011, regular hearing that he received monthly Social Security disability payments of $884.

Claimant indicated he started receiving Social Security retirement benefits shortly after turning 65. Social Security Administration records indicate that in December 2012, claimant began receiving monthly Social Security retirement benefits of $1,047.20, less $104.90 for Medicare for a net of $942. In December 2013, claimant began receiving $1,062.90 per month, less $104.90 for Medicare for a net of $958. Claimant testified $460 per month was being deducted for an overpayment. The total overpayment due and owing at the time of claimant's October 27, 2014, deposition was $2,300 or less.

The ALJ granted respondent's request to modify claimant's award, finding:

> For permanent total payments, the weekly amount may be offset per K.S.A. 44-501(h) but the employee is still required to be paid the entire permanent total award. *McIntosh v. Sedgwick County 282 Kan. 636 Syl 6 and 7 (2006).* According to exhibit one to the deposition of Mr. Orem, the claimant is currently receiving the equivalent of $587.20 per month in cash and medicare benefits (a gross amount of $1047.20 minus $460.00 per month in deductions for prior over-payment of benefits). Multiplying $587.20 x 12 and dividing by 52 results in an offset of $135.50 per week in Mr. Orem's workers compensation benefits of $298.26 per week. The Court finds $135.50 per week to be the correct amount of the offset allowed the respondent and its insurance carrier.
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> The respondent argues that the deduction should be made from the gross amount of benefits owed to the claimant. However, the primary rule for statutory interpretation is that "When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction." *Bergstrom v. Spears Manufacturing* 289 Kan. 605 syl. 1 (2009). There is nothing ambiguous about the phrase in K.S.A. 44-501(h) "is receiving" nor the phrase "weekly equivalent amount of the total amount of all such retirement benefits," referring to the amount of benefits the claimant is actually receiving. The only benefits the claimant is currently receiving are his monthly stipend and medicare as delineated above.[4]

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[3] Claimant Depo. (Oct. 27, 2014) at 7.

[4] ALJ Award Upon Review and Modification at 4-5.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(h) states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Claimant relies on *Hoesli*.[5] As stated by the ALJ:

> This Court would note *Hoesli*, op cit., at this writing, remains on appeal to the Kansas Supreme Court and thus the decision is not binding but may be cited as "persuasive authority." See Supreme Court rule 8.03(j) as amended August 28, 2014. Even if the decision were binding, the Court of Appeals did not invalidate the K.S.A. 44-501(h) on constitutional grounds even though the panel who decided the case apparently concluded there was no longer a rational basis for offsetting workers compensation benefits as a result of the receipt of social security benefits based upon changes in federal law.[6]

In *Morales*,[7] Morales argued that *Hoesli* determined the Social Security offset no longer applies when an injured worker reaches the age of 65. The Board's Order stated, "Regardless of the decision in *Hoesli*, at this time the Board is required to follow the mandate of the Court of Appeals in this matter and apply the social security offset to claimant's award."

Even if the Board were to consider *Hoesli*, the facts in *Hoesli* differ significantly from the facts in the present claim. Hoesli began working for Triplett in 2008 and at that time was 65 years old and not yet collecting Social Security benefits. In April 2008, after Hoesli reached the age of 66, he began drawing his full Social Security benefit of $1,820 a month. His Social Security benefit was not reduced or offset by his full-time employment. In May

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[5] *Hoesli*, *supra*.

[6] ALJ Award Upon Review and Modification at 4.

[7] *Morales v. Wal-Mart*, No. 1,046,556, 2014 WL 1758029 (Kan. WCAB Apr. 30, 2014).

2010, Hoesli sustained a work injury at Triplett. Triplett sought a credit under K.S.A. 44-501(h). The Kansas Court of Appeals refused to grant a credit, stating:

> The final analysis boils down to several essential facts. At the time of Hoesli's work-related injury, he was entitled to receive and was receiving two streams of income. Neither source of income was subject to setoff or any other limitation. Hoesli would have continued to receive both undiminished streams of income into the future but for his work-related injury. The grant of a workers compensation award in this case would serve to make Hoesli whole. It would replace an income he was legally receiving and would place him in a position similar to the position he was in prior to his injury. To apply the setoff would act as a penalty, placing Hoesli in a worse position than he was in prior to the injury. To apply the K.S.A. 2010 Supp. 44-501(h) setoff would result in an outcome inconsistent with the stated purpose of wage-loss replacement under our workers compensation statutes. Therefore, we reverse the ruling of the Board.[8]

In *McIntosh*,[9] the Kansas Court of Appeals indicated the cases discussed have two consistent patterns: (1) the work injury occurs, then retirement; no duplication of benefits allowed under *Gadberry*,[10] *Brown*,[11] *Treaster*[12] and *Wishon*;[13] and (2) retirement, then the work injury; multiple benefits are allowed under *Boyd*[14] and *Dickens*.[15] In the first category of cases, a reduction is allowed for the Social Security benefits. In the second category of cases, no reduction occurs.

The present claim falls in the first category. Claimant sustained a work injury and resulting disability in March 2009. Subsequently, claimant began receiving Social Security disability benefits and later, after turning 65, began receiving Social Security retirement benefits. Under that scenario, our appellate courts have applied the reduction imposed by

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[8] *Hoesli*, 49 Kan. App. 2d at 1023.

[9] *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, *rev. denied* 278 Kan. 846 (2004).

[10] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[11] *Brown v. Goodyear Tire & Rubber Co.*, 3 Kan. App. 2d 648, 599 P.2d 1031 (1979), *aff'd* 227 Kan. 645, 608 P.2d 1356 (1980).

[12] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[13] *Wishon v. Cossman*, 268 Kan. 99, 991 P.2d 415 (1999).

[14] *Boyd v. Barton Transfer & Storage*, 2 Kan. App. 2d 425, 580 P.2d 1366, *rev. denied* 225 Kan. 843 (1978).

[15] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

K.S.A. 2008 Supp. 44-501(h). Accordingly, the Board finds respondent should be granted a reduction for claimant's Social Security retirement benefits.

The Award Upon Review and Modification granted respondent a weekly credit of $135.50. Respondent argues that figure is incorrect and the ALJ should have granted a reduction for the weekly equivalent of $1,062.90 in monthly retirement benefits claimant receives from Social Security. If respondent's argument is adopted, claimant's weekly workers compensation benefits would be reduced by $245.28 ($1,062.90 x 12 months = $12,754.80 ÷ 52 weeks = $245.28).

K.S.A. 2008 Supp. 44-501(h) states the compensation benefit payments the employee is eligible to receive "shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits." In *Bergstrom*,[16] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The Board finds claimant's weekly permanent total disability payment shall be reduced by $245.28 per week commencing March 12, 2014. The plain language of K.S.A. 2008 Supp. 44-501(h) requires the Board to reduce claimant's workers compensation benefits by the weekly equivalent of claimant's total Social Security benefits, or $1,062.90 per month. This equates to a permanent total disability benefit rate of $52.98 per week ($298.26 - $245.28 = $52.98). The Board also notes that claimant testified on October 27, 2014, that the balance on his overpayment from Social Security was $2,300 or less. That testimony is uncontroverted. Claimant, presumably, has now repaid Social Security the balance of the overpayment, and $460 is no longer being deducted from his monthly Social Security retirement payments.

CONCLUSION

Pursuant to K.S.A. 2008 Supp. 44-501(h), commencing March 12, 2014, claimant's weekly permanent total disability payments shall be reduced by $245.28.

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[16] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

AWARD

WHEREFORE, the Board modifies the November 19, 2014, Award Upon Review and Modification entered by ALJ Avery as follows:

Claimant is entitled to 30.14 weeks of temporary total disability compensation at the rate of $300.74 per week, or $9,064.30, followed by 66.86 weeks of temporary total disability compensation at the rate of $298.26 per week, or $19,941.66, followed by 162 weeks of permanent total disability compensation at the rate of $298.26 per week, or $48,318.12, followed by permanent total disability compensation at the rate of $52.98 per week not to exceed $125,000 for a permanent total disability.

As of April 27, 2015, there would be due and owing to the claimant 30.14 weeks of temporary total disability compensation at the rate of $300.74 per week, or $9,064.30, plus 66.86 weeks of temporary total disability compensation at the rate of $298.26 per week, or $19,941.66, plus 162 weeks of permanent total disability compensation at the rate of $298.26 per week, or $48,318.12, plus 58.86 weeks of permanent total disability compensation at the rate of $52.98 per week, or $3,118.40, for a total due and owing of $80,442.48, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $44,557.52 shall be paid at the rate of $52.98 per week until fully paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award Upon Review and Modification to the extent they are consistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I concur out of a duty to follow binding precedent.[17] However, as previously noted in my concurring opinion in *Unruh*,[18] our appellate case law regarding the social security offset is not based on the literal interpretation of a plain and unambiguous statute, but instead is rooted in concepts found nowhere in the statute (such as "wage loss duplication" and applying the law differently depending on whether injury or retirement occurs first). Why these unwritten concepts trump statutory language is confusing.

BOARD MEMBER

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Honorable Brad E. Avery, Administrative Law Judge

[17] The duty to follow binding precedent, despite a literal reading of K.S.A. 44-501(h), is noted in *Hoesli v. Triplett, Inc.*, 49 Kan. App. 2d 1011, 1021-22, 321 P.3d 18 (2014), *pet. for rev. filed* Apr. 3, 2014, and *Farley v. Above Par Transportation*, 50 Kan. App. 2d 866, 334 P.3d 883 (2014), *pet. for rev. filed* Oct. 3, 2014. This Board Member is not citing either case as precedent, but rather cites such cases demonstrate the discrepancy between literal and non-literal means of construing the legislature's intent.

[18] *Unruh v. Rex Stanley Feed Yard, Inc.*, No. 1,053,222, 2014 WL 4976735 (Kan. WCAB Sept. 29, 2014).